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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ABLE FREDDIE JOHNSON, Defendant and Appellant.	B289925 (Los Angeles County Super. Ct. No. YA092549)

APPEAL from a judgment of the Superior Court of Los Angeles County, Scott T. Millington, Judge. Affirmed.

Ava Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, David E. Madeo and Nancy Lii Ladner, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted appellant Able Johnson of attempted murder and shooting at an occupied vehicle. Appellant claims the jury lacked sufficient evidence to find the intent to kill required for attempted murder. He also contends the trial court erred by refusing to instruct the jury on the lesser included offense of attempted voluntary manslaughter based on a heat of passion theory. We find no error and therefore affirm.

PROCEDURAL HISTORY

An information filed on November 3, 2015 charged appellant with one count of attempted murder (Pen. Code, §§ 664, 187, subd. (a); count one)[1] and one count of shooting at an occupied vehicle (§ 246; count two). On count one, the information alleged that the attempted murder was "willful, deliberate, and premeditated." (§ 664, subd. (a).) The information further alleged that appellant personally discharged a handgun, which caused great bodily injury (§ 12022.53, subds. (b)-(d)) and personally inflicted great bodily injury in the commission of the charged offenses (§ 12022.7, subd. (a)).

The jury found appellant guilty on both counts. On count one, the jury found not true the allegation that the attempted murder was committed willfully, deliberately, and with premeditation within the meaning of section 664, subdivision (a). The jury found the special allegations regarding appellant's personal use of a firearm to be true. The court sentenced appellant to 25 years in prison on count one, consisting of the low term of five years, plus 20 years pursuant to section 12022.53, subdivision (c). On count two, the court sentenced appellant to

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[1]All further statutory references are to the Penal Code unless otherwise indicated.

23 years, consisting of the low term of three years, plus 20 years pursuant to section 12022.53, subdivision (c). The court stayed the sentence on count two pursuant to section 654. On both counts, the court stayed the additional enhancements under section 12022.53, subdivision (b) and struck the gun allegations under section 12022.53, subdivision (d).

Appellant timely appealed.

FACTUAL BACKGROUND

The following evidence was adduced at trial.

A. *Prosecution evidence*

Appellant and Candice Taylor met in high school and dated on and off. At the time of the incident, June 5, 2015, they had been dating for the past year and Taylor would often stay at appellant's home. Taylor testified about several prior incidents of domestic violence against her by appellant. She also admitted that she had lied to appellant for months about being pregnant because she wanted to stay in the relationship, and that appellant was hurt when he discovered that she was not pregnant.

Taylor testified that on the evening of June 5, 2015, she was with her cousin, Lajuan Major, at Major's house. Taylor had been trying to get in touch with appellant all day because she needed some of her clothing from his apartment, but did not have a key. When appellant finally answered his phone around 10:00 p.m., he and Taylor began to argue and appellant "started yelling." He told Taylor that he was packing up her belongings in trash bags and putting them outside his apartment for her to retrieve. Major took the phone from Taylor and began "exchanging words" with appellant about how he was treating Taylor. Major testified that she took the phone from Taylor

because Taylor "couldn't get control of the conversation. [Appellant] was yelling and being belligerent towards her." According to Major, appellant was yelling and cursing, and threatening Major and Taylor to "bring closed caskets and stuff like that." She felt scared.

Either Major or appellant hung up the phone. However, Major, appellant, and Taylor continued to argue by exchanging text messages on appellant's and Taylor's phones. Appellant texted that he was throwing Taylor's belongings in the trash and she needed to come get them. Appellant also posted on Snapchat[2] a photo showing him putting Taylor's belongings in bags and putting those bags into the dumpster behind his apartment building.

Both Major and Taylor testified regarding several texts sent by appellant that evening that they found threatening. In one, appellant texted to Major, "Yal don't like that. Bring your niggas, closed casket." She interpreted that to mean "basically to bring a closed casket for whoever he's gonna kill." In another message, he said, "So yal can live, breathe, and die together." In the final message of the exchange, appellant wrote, "If that's how U feel come get it . . . I'm bagging it up now . . . and if U pull up on some gym shit basketballs is getting shot." Major testified that she understood the final phrase to mean if they went to retrieve Taylor's things wearing basketball shorts, they would be looking for a fight; she also noted that appellant said the same

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[2] Snapchat is a social media application, which witnesses explained allows a user to post a photograph visible to other users for a short period of time before it disappears from the application. Taylor testified that she did not personally see appellant's Snapchat post depicting him throwing her things in the dumpster, but Major did and told her about it.

thing over the phone. Taylor testified that she had intended to go alone to get her things, but after seeing the text about getting shot, she changed her mind. Taylor stated that neither she nor Major made any threats to appellant on the phone or by text.

Taylor testified that she decided to ask her friend Charles Spratley to go with her to retrieve her belongings, because Spratley knew about previous situations in which she and appellant had argued and appellant had "put[ ] his hands on" her. Around 11:30 p.m. or 12:00 a.m., Taylor borrowed Major's car, picked up Spratley and his nephew, Anthony Gates, and drove to appellant's apartment. Taylor and Spratley both testified that neither Spratley nor Gates had any weapons with them.[3]

Appellant lived with his mother in a building fronted by ground floor retail space. The retail space was owned and operated by appellant's mother. Behind that, appellant lived in a second-floor apartment unit accessible by a staircase on the side of the building. At the top of the staircase, there was a landing enclosed by a metal cage with a security gate; appellant's front door was through this gate. The building had a parking lot on the side with marked stalls; one of the stalls ended right next to the bottom of the apartment staircase.

Taylor testified that she, Spratley, and Gates arrived at appellant's apartment late on June 5 or early in the morning on

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[3]Spratley was a former gang member. At the time of the incident, he had founded and worked for an organization for at-risk youth to help them avoid or cease gang involvement. Taylor knew that Spratley had been a gang member, but she did not think he was still a gang member on the night of the incident. At the preliminary hearing, she testified that both Spratley and Gates were "east side Crips" and she brought them with her for protection.

June 6, 2015. She parked in the parking lot, next to appellant's car and near the staircase leading to appellant's apartment. Taylor, Spratley, and Gates walked to the dumpster at the back of the building, removed the bags containing Taylor's belongings, and put the bags in the car trunk. As they were doing so, Taylor saw appellant appear on the balcony. She reported this to Spratley, who told her, "Don't make any eye contact. Don't say anything."

After they put her bags in the trunk and closed the trunk, Taylor saw appellant at the bottom of the stairs with his hands behind his back, standing a few inches from the front of the car. Spratley told her to get into the car. She got into the driver's seat, Gates got into the back seat, and Spratley started to get into the front passenger's seat. Taylor testified that she heard appellant say, "What did you say?" to Spratley. Appellant then took a gun from behind his back and fired a gunshot at the car, hitting the passenger-side mirror.[4] After the shot, Spratley "dove into the car" so that his head was across her lap. After a pause, Spratley lifted his head "a little bit, and that's when the rest of the shots were fired off." Those shots all hit the car's front windshield. As Taylor tried to back up the car up to leave, she hit the wall of the building behind her. After some additional maneuvering, she was able to drive away. According to Taylor, appellant fired a total of six shots at them; neither Spratley nor Gates fired any shots.

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[4]During cross-examination, Taylor testified that Spratley made the statement, "What did you say?" to appellant, rather than the other way around. She did not hear what appellant said back to Spratley because she was already in the car. She also said that Spratley was partially in the car, but then began to get back out as he addressed appellant.

Spratley testified that he first saw appellant that night after he finished loading Taylor's bags into the car trunk. Appellant was standing on the stairs in front of them. Spratley told Gates and Taylor, "Don't say nothing, just get in the car," because he "had a feeling because [appellant] had his hands behind his back." He got into the front passenger seat of the car, Taylor got into the driver's seat, and Gates got into the rear passenger's seat. As Taylor started the engine and put the car into reverse, appellant yelled, "What, nigga?" Spratley testified that he did not say anything to appellant. Spratley "leaned up" and grabbed the door, then appellant shot one time, hitting the door mirror. Spratley laid across the front seat and Taylor started to reverse, but hit a wall. Spratley sat up when the car hit the wall, at which point appellant fired four or five more shots into the windshield of the car. After about three shots were fired, Spratley realized he had been hit. He was shot in the pelvis.

As Taylor drove away, Spratley told her he had been shot, but he asked to go home, rather than to the hospital. Taylor complied. Spratley testified that he told Taylor to take him home because he was angry and wanted to "get" appellant. He also told Taylor not to call the police. Taylor complied, but did call Major to tell her what happened. Major called 911.

After Spratley arrived home, he calmed down and agreed to go to the hospital. He admitted at trial that he had lied to the first officers from the Los Angeles Police Department who questioned him at the hospital because he did not want to deal with the police. He told them he was shot as a passerby in a drive-by shooting. Later, officers from the Inglewood Police Department (IPD) questioned him again, after responding to Major's 911 call. Spratley told them the truth, because they

"basically had the story already" from speaking with Major and Taylor.

IPD officer George Baltierrez testified that he responded to a 911 call early on June 6, 2015 regarding a shooting at appellant's residence. He and his partner interviewed people who were on the street in front of a nearby bar, but no one said they heard or saw anything. The officers also searched outside the building for evidence of a shooting, but found no bullet casings, blood, bullet strikes against the walls, or any other evidence. Afterward, they responded to Major's 911 call and interviewed Taylor at Major's residence around 2:30 a.m.

Appellant did not leave his apartment for three days after the shooting. When he did emerge on June 9, 2015, he was arrested by IPD officers. The officers also executed a search warrant on the apartment the same day. The lead investigator, IPD detective Daniel Milchovich, testified that when searching the apartment, he found a Glock handgun in a bathroom, on a ledge near the ceiling, along with three empty magazines. The gun was registered to appellant. Milchovich also inspected the wall next to the staircase and the area around the bottom of the staircase for bullet holes or strikes, and found none.

Taylor and Major found bullet fragments in the glove compartment of Major's car a week after the incident. They notified IPD officers, who retrieved the fragments.

The prosecution presented expert testimony that the rifling patterns left on the bullet fragments found in Major's car matched the grooves in the barrel of the Glock registered to appellant. The expert therefore opined that those bullets were fired from appellant's Glock.

IPD officers also impounded and examined Major's car. They found one bullet hole in the passenger-side mirror and five bullet holes in the front windshield. They tested the trajectories of the bullets by putting rods through the bullet holes and into the bullet strikes (the impact marks of the bullets as they travelled through material in the car). The trajectories all ran through the front windshield, downward toward the passenger side of the vehicle. These trajectories were consistent with someone standing within inches of the front of the vehicle, firing from an elevated position. Detective Milchovich testified that he did not believe the shooter was necessarily changing position while firing.

B. *Defense evidence*

Appellant's mother, Arore Wagoner, testified on behalf of her son. She owns the plant store in the front of the building and lives in the building with her son. She also worked for many years as a security guard and had a gun at home. On the evening of June 5, 2015, from about 6:00 to 7:00 p.m., she was helping appellant record music in his home studio. Appellant then received a phone call from Taylor. He had the phone on speaker, so Wagoner could hear Taylor and also Major in the background on the other end swearing and telling appellant Major was going to "kick [his] ass." Appellant told them to come get Taylor's clothes. When some time passed and Taylor had not arrived, appellant texted them that he was putting the bags of clothes in the dumpster.

Some time later, Wagoner heard Taylor and a man talking near the dumpster located outside a window in the back of the building. The man said, "I'm gonna shoot Able's house up and kill him." Then Wagoner heard something like, "Able, come out

or I'm gonna come in and get you." Then she heard a gunshot. After the shot, appellant went outside. Wagoner testified that she heard more shots, after which appellant came back into the apartment. She said she and appellant wanted to call 911, but appellant couldn't find his phone. Instead, they went back to working on appellant's music.

Wagoner testified that she and appellant stayed in the apartment for several days, because they were afraid. They left when they ran out of food.

During cross-examination, the prosecutor asked whether appellant was calm while Major was threatening to "kick [his] ass." Wagoner responded that appellant was calm, not angry. She estimated that about ten minutes elapsed between the time she heard the threats through the window and the subsequent gunshot. She and appellant did not discuss anything during that period because she was "bent down" and praying. When appellant came back inside, after she heard the shots outside, she did not ask him what happened and he did not explain it.

Appellant also testified in his defense. He said that he owned the gun in connection with his employment as a security guard. He was home in the evening on June 5 when Taylor called around 10:00 p.m. She said she needed to get some clothes from his apartment. Then Major took the phone from Taylor and "started flipping out" and yelling obscenities at appellant. According to appellant, Major told him she was "going to ask somebody to come fuck you up." Eventually appellant told Major that they could come get Taylor's belongings, and then he hung up. Appellant testified that he was "fed up" and decided the relationship with Taylor was over. He was not angry during the conversations with Taylor and Major and did not believe Major's

threats. He was still calm when he texted, "Fuck U yo shit outside" to Taylor.

He explained that the portion of the text stating, "if U pull up on some gym shit basketballs is getting shot" was not intended for Taylor. It was lyrics to the song he was working on and he accidentally included it in the text. He said his reference to "closed casket" was a metaphor meaning "it's over with. It's a sealed deal."

Appellant took Taylor's bags outside and put them at the bottom of the stairs. After 40 minutes to an hour passed, he moved them to the dumpster, because he was tired of watching to make sure they did not get stolen. He was not angry when he put the bags in the dumpster. After he put Taylor's bags in the dumpster, he went back inside and continued to work on his music. About 10 or 20 minutes later, he heard a car pull into the parking lot. He "kept doing whatever I was doing" and did not respond. He was sitting with his mother in the bedroom, working on music, when from outside the window, he heard a male voice say, "Fuck that nigga Able. I'm gonna kill him, I'll shoot his house up." He did not recognize the voice. Appellant testified that this "concerned me a lot." He started looking for his phone to try to call the police "just in case they did start shooting up the house." As he was searching, he heard someone say "Fuck that. Come out or we're coming in," followed by a gunshot. He told his mother to take cover; she was "freaking out," shaking, praying, "speaking in tongues, things of that nature."

Appellant testified that he decided to go outside to try to "tone things down a little" and defuse the situation, a tactic he said he had used successfully in his experience as a security guard. Appellant took his gun from his work bag and holstered it

on the back right side of his hip, to "keep it out of sight when . . . I'm trying to communicate with whoever it was outside my house." He went out the front door to the second-floor landing and saw Major's car, empty, with the driver's door open. As he walked down the stairs to the parking lot, he said, "I don't want any problems." As he reached the bottom of the stairs, he heard another gunshot. He dropped to the ground behind his car, "trying to see what the hell is going on because I just got shot at." Next, he heard another bullet "fly by me" and saw someone running toward him between the cars. Appellant thought that "these guys fixing to come try to finish killing me or come try to kill me. So I drew my weapon, I got up, and I shot and ran up the stairs, and I did that to try to keep them from shooting at me while my back was turned to them." Appellant testified that he "didn't aim at anybody. I didn't want to shoot anybody. I just wanted to get back in the house." He was shooting "cover fire" in the direction that he perceived the threat to be coming from. He shot with his right hand over his left shoulder as he ran up the stairs. He did not know who was there and had no intention of hurting anyone. He did not hear anyone say anything to him.

Once he was back inside, appellant went to check on his mother, who was fine. He did not know anyone had been shot at that time. He still could not find his phone. He and his mother waited and hoped that the police would show up, but he was not aware that any police came to the apartment that night.

DISCUSSION

I. *Substantial Evidence of Intent*

Appellant asserts that there was insufficient evidence of his intent to kill to support his attempted murder conviction. We disagree.

"In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one. '"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]'" (*People v. Smith* (2005) 37 Cal.4th 733, 738-739 (*Smith*).)

'"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

"The mental state required for attempted murder has long differed from that required for murder itself. Murder does not require the intent to kill. Implied malice—a conscious disregard for life—suffices." (*People v. Bland* (2002) 28 Cal.4th 313, 327.) In contrast, "[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623; see also *Smith, supra*, 37 Cal.4th at p. 739.)

"Intent to unlawfully kill and express malice are, in essence, 'one and the same.'" (*Smith, supra*, 37 Cal.4th at p. 739.) "Express malice requires a showing that the assailant '"either

desire[s] the result [i.e., death] or know[s], to a substantial certainty, that the result will occur.'"'" (*Ibid*.)

"Because intent is rarely susceptible of direct proof, it may be inferred from all the facts and circumstances disclosed by the evidence." (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1245.) As relevant here, "the act of purposefully firing a lethal weapon at another human being at close range, without legal excuse, generally gives rise to an inference that the shooter acted with express malice. That the shooter had no particular motive for shooting the victim is not dispositive, although again, where motive is shown, such evidence will usually be probative of proof of intent to kill." (*Smith, supra*, 37 Cal.4th at p. 742.) Moreover, "even if the shooting was not premeditated, with the shooter merely perceiving the victim as 'a momentary obstacle or annoyance,' the shooter's purposeful 'use of a lethal weapon with lethal force' against the victim, if otherwise legally unexcused, will itself give rise to an inference of intent to kill." (*Smith, supra*, 37 Cal.4th at p. 742, quoting *People v. Arias* (1996)13 Cal.4th 92, 162.)

Applying these principles here, we conclude that substantial evidence supports the jury's finding that appellant acted with an intent to kill Spratley. Appellant sent text messages to Taylor and Major during an argument prior to the shooting that included references to getting shot and "closed caskets," which the women perceived as threatening. Major also testified that appellant had made the same statements by phone. Taylor and Spratley both testified that they saw appellant standing a few feet in front of the car as they were getting back into the car to leave, and that appellant and Spratley exchanged words just before appellant fired the first shot. They further

claimed that appellant was the only one armed during the incident, testimony supported by the lack of physical evidence of any shots fired toward appellant. Taylor stated that she saw appellant aim and fire directly at the car and that he fired the second round of multiple shots when Spratley raised his head from his prone position in the car. Appellant had training and experience in using his handgun from his position as a security guard. He did not dispute that he took his gun when he went outside, or that he fired it intentionally. In addition, the evidence of the trajectories of the bullets was consistent with the testimony of Taylor and Spratley that appellant was standing at close range in front of the car when he fired. That evidence also showed that the trajectories for all of appellant's shots were on the passenger side of the car, where Spratley was seated.

Appellant points to his alternative explanations for the text messages as negating any intent to kill. He also relies on his testimony that he did not intend to shoot anyone, but was merely shooting to cover himself during his escape from a perceived threat. But the jury was not required to accept appellant's version of events, and we will not reweigh the evidence. (See, e.g., *People v. Ochoa, supra,* 6 Cal.4th at p. 1206.) We also reject appellant's argument that his act of shooting into the vehicle, alone, was insufficient to support a finding of express malice. There was ample evidence, in addition to the act of shooting, from which the jury could find an intent to kill. Appellant's cited cases are therefore inapplicable. (See *People v. Ratliff* (1986) 41 Cal.3d 675, 696 [finding that "the defendant's act of shooting his victim at close range did not so conclusively demonstrate an intent to kill as to render harmless" an error in jury instructions on

attempted murder]; *People v. Johnson* (1981) 30 Cal.3d 444, 447-449 [same].)

Accordingly, we find the jury's verdict was supported by substantial evidence.

II. *No Error to Refuse Jury Instruction on Heat of Passion*

Appellant also contends the trial court erred in refusing to instruct the jury on attempted voluntary manslaughter under a heat of passion theory. During trial, defense counsel requested jury instructions on attempted voluntary manslaughter under two theories, self-defense and heat of passion, both over the prosecutor's objection. The court agreed to instruct the jury on self-defense and imperfect self-defense, but denied the request to give a heat of passion instruction. Appellant argues that the evidence at trial supported a heat of passion theory. We are not persuaded. Further, we find that any error would have been harmless.

A. *Legal Principles*

"'[A] trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present.' [Citation.] Conversely, even on request, a trial judge has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction. [Citation.] "'Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive.'" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008.)

"This substantial evidence requirement is not satisfied by "'any evidence . . . no matter how weak,'" but rather by evidence

from which a jury composed of reasonable persons could conclude "that the lesser offense, but not the greater, was committed." [Citation.] "On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense." [Citation.]" (*People v. Souza* (2012) 54 Cal.4th 90, 116 (*Souza*).)

"'Manslaughter, an unlawful killing without malice, is a lesser included offense of murder.'" (*People v. Avila* (2009) 46 Cal.4th 680, 705.) "Both theories of partial exculpation, heat of passion and imperfect self-defense," act to reduce murder to manslaughter by negating the existence of malice. (*People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1016.) "'Although section 192, subdivision (a), refers to 'sudden quarrel or heat of passion,' the factor which distinguishes the 'heat of passion' form of voluntary manslaughter from murder is provocation.'" (*Souza, supra*, 54 Cal.4th at p. 116.) "'The "'heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances. . . .'" [Citation.]'" "'The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim.'" (*Ibid.*) "Heat of passion, then, is a state of mind caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation. While some measure of thought is required to form either an intent to kill or a conscious disregard for human life, a person who acts without reflection in response to adequate provocation does not act with malice." (*People v. Beltran* (2013) 56 Cal.4th 935, 942.)

B. *Analysis*

Here, there was no substantial evidence that appellant acted under the influence of a reasonable heat of passion, and accordingly, the trial court did not err in refusing the requested instruction. Appellant suggests that he could have been reasonably provoked by "the two threats followed by the gunshot near the dumpster behind his apartment; or . . . by the bullet that whizzed by him as he crouched behind his vehicle; or . . . by the earlier threats from Major that she was going to send some people to get him." We disagree. Based on appellant's own testimony, there is no evidence that when he fired the shots at the car, his judgment was obscured by passion. Appellant testified that he was not afraid as a result of Major's threats and did not take them seriously. Further, he testified that after hearing the threats by the dumpster, he decided to go outside to attempt to calm the situation, utilizing his security guard training to do so. He also explained his reasoning when deciding to shoot after he perceived shots being fired at him—he "didn't aim at anybody" or intend to shoot anyone, but rather attempted to use "cover fire" while retreating up the stairs into his apartment. As such, appellant's testimony does not support an inference that he shot at Spratley with the intent to kill, but that his intent was clouded in the heat of passion.

Appellant argues that the trial court had the duty to instruct on a heat of passion theory even when contrary to his own testimony, as the jury could reasonably disbelieve him and conclude based on other evidence that he acted "while his judgment was obscured due to passion aroused by sufficient provocation." Appellant is correct that the trial court has a duty to instruct on a lesser-included offense supported by substantial

evidence, "even though the evidence supporting the lesser offense is inconsistent with the accused's defense." (*People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1017, citing *People v. Bradford* (1997) 15 Cal.4th 1229, 1345.) Here, however, as we have explained, there was no substantial evidence supporting a heat of passion instruction. Appellant's mother did not testify that he was upset when he went outside and there is no evidence in the record to suggest otherwise. In addition, appellant's decision to take his gun to confront Taylor and her friends, as well as the location of the shots he fired, support the inference that his act of shooting was reasoned and deliberate, rather than the product of a strong passion resulting from provocation.

C. *Harmless Error*

In addition, we conclude that any error would have been harmless. We review a trial court's error in failing to instruct on a lesser-included offense for prejudice under *People v. Watson* (1956) 46 Cal.2d 818. (See *People v. Breverman* (1998) 19 Cal.4th 142, 178.) Under that standard, we reverse the conviction for error only if "it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred" (*Ibid.*; see also *People v. Watson, supra*, 46 Cal.2d at p. 836).

Here, although the trial court refused the heat of passion instruction, it instructed the jury on attempted voluntary manslaughter based on self-defense. The jury rejected that theory in finding appellant guilty of attempted murder. Appellant's self-defense and heat of passion theories were both based on his assertion that he reacted out of fear and in the belief someone was shooting at him. As such, it is not reasonably probable that the jury would have credited a heat of passion

theory where it rejected self-defense based on the same facts. (See *People v. Moye* (2009) 47 Cal.4th 537, 557 ["the jury having rejected the factual basis for the claims of reasonable and unreasonable self-defense, it is not reasonably probable the jury would have found the requisite objective component of a heat of passion defense (legally sufficient provocation) even had it been instructed on that theory of voluntary manslaughter"].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

MANELLA, P. J.

WILLHITE, J.